Supreme Court, U. S.
FILED
JAN 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1024

Petition for Certiorari by NOEL BERTHOLD BAUM, Appellant, to review a decision of the United States Court of Appeals for the Fifth Circuit, in the cause entitled:

In Re	**In Proceedings for**
Noel Berthold Baum, *Debtor*	**An Arrangement**

NOEL BERTHOLD BAUM,

Appellant,

versus

R. C. ANDERSON,

Appellee.

Regular Counsel: W. P. WRAY, JR., *Attorney*
WRAY & ROBINSON
P. O. Box 3674
Baton Rouge, La. 70821
Tel.: 387-4957

Special Counsel: FRANZ JOSEPH BADDOCK, *Attorney*
P. O. Box 3573
Baton Rouge, La. 70821
Tel.: 343-9194

Franklin Press, Inc. Baton Rouge, La.

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

Petition for Certiorari by NOEL BERTHOLD BAUM, Appellant, to review a decision of the United States Court of Appeals for the Fifth Circuit, in the cause entitled:

In Re **In Proceedings for**
Noel Berthold Baum, *Debtor* **An Arrangement**

NOEL BERTHOLD BAUM,
Appellant,

versus

R. C. ANDERSON,
Appellee.

PRELIMINARY STATEMENT

Debtor's Regular Counsel is W. P. Wray, Jr., who is admitted to practice before this Court. In the Arrangement Proceeding herein involved, Special Counsel has had prime responsibility pertaining thereto.

Insertion of the name of Appellant's Regular Counsel on the cover is only for purpose of compliance with RULE 39-2 of this Court, and is not to be construed that the latter assumed any responsibility for the contents of this Petition, which was prepared entirely by Special Counsel.

In the event Certiorari is granted, the matter will be handled either by Appellant's Regular Counsel, or other Counsel admitted to practice before this Court.

In accordance with RULE 23 of this Court, Special Counsel respectfully submits:

Opinions of both the United States District Court and Court of Appeals for the Fifth Circuit, are appended hereto.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

The Court of Appeals has decided federal questions in a way in conflict with applicable Orders of this Court, namely, the Rules of Bankruptcy Procedure.

The Court of Appeals has so far departed from the accepted and usual Rules of Bankruptcy Procedure, and has so far sanctioned such a departure from these Rules by the Lower Court, as to call for an exercise of this Court's power of supervision.

The date of the judgment sought to be reviewed is **November 5, 1976**. Judgment was entered the same date.

Rehearing was DENIED on **December 2, 1976.** Extension of time was neither applied for nor granted within which to petition for certiorari.

Statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are: 28 U.S.C.A. 1254(1), 28 U.S.C.A. 2101(c), Section 24(c) of the Bankruptcy Act (11 USC 47(c)), and Section 302 of the Bankruptcy Act (11 USC 702).

THE QUESTIONS PRESENTED FOR REVIEW

When Rules of Bankruptcy Procedure mandate that a Petition filed under the Act SHALL operate as a stay of the COMMENCEMENT of any court or other proceeding against Debtor, is the Bankruptcy Court authorized to condone COMMENCEMENT of such action in violation of the mandate?

Does it comport with the standard of equality, fairness, and justice, to condone a "double standard" where some Debtors will have to suffer COMMENCEMENT, and others will not?

When Rules of Bankruptcy Procedure mandate that a COMPLAINT must be filed by a Creditor seeking to vacate the Automatic Stay under the Rules, is the Bankruptcy Court authorized to condone COMMENCEMENT of an action without **the prior filing of such COMPLAINT?**

Does it comport with the standard of equality, fairness, and justice, to condone a "double standard" where some Creditors will have to file a COMPLAINT, and others will not?

This case involves **seven** (7) of the Rules of Bankruptcy Procedure, namely, Rules **401, 601, 9-4, 10-601, 11-44, 12-43,** and **13-401.**

CONCISE STATEMENT OF THE CASE

(NOTE: The citation "Tr" is to the page of the Appendix in the United States Court of Appeals, Fifth Circuit.)

Appellant filed a Petition for Arrangement on January 9, 1976 in the Middle District of Louisiana. **On the same date,** Appellant had long distance conversations both with Creditor/Appellee R. C. ANDERSON **and** Anderson's Attorney. The transcript of testimony indicates Appellee had knowledge of the filing. (Tr 39-40). Nevertheless, three (3) days **AFTER** Debtor filed his Petition, Appellee filed foreclosure against Debtor in the 19th Judicial District Court of Louisiana, in the cause entitled "R. C. ANDERSON **vs** NOEL BERTHOLD BAUM"—Docket No. 188369 of that Court. (Tr 64-67).

NO **COMPLAINT** WAS FILED BY THIS CREDITOR SEEKING RELIEF FROM THE STAY, UNDER RULE 11-44 (d) OR (e) BRP.

Appellant requested the foreclosure proceeding be withdrawn. Appellee refused (Tr 68). Because of this refusal, Appellant sought relief from the Bankruptcy Court, requesting the Court to order and direct Appellee to withdraw, and other relief (Tr 58-60). The Bankruptcy Court DENIED all relief sought (Tr 52-56). On Appeal, the District Court affirmed (Tr 8). The Court of Appeals, noting that:

> ". . . our decision will have far reaching effects on all the Chapters of the Act." (Decision Page 6460)

modified the Judgment and as modified affirmed.

The basis for federal jurisdiction in the court of first instance can be found in Sections 2a(15) and 302 of the

Bankruptcy Act (11 USC Sections 11a(15) and 702), as well as Rules 770, 771, and 914 of the Rules of Bankruptcy Procedure.

DIRECT AND CONCISE ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Appeals was certainly correct that its decision will have far reaching effects on ALL Chapters of the Bankruptcy Act, since the identical or substantially identical language:

A PETITION FILED UNDER THE ACT SHALL OPERATE AS A STAY OF THE **COMMENCEMENT** OF ANY COURT OR OTHER PROCEEDING AGAINST THE DEBTOR

can be found not only in RULE **11-44** RBP, but in the companion Rules **401**, **601**, **9-4**, **10-601**, **12-43**, and **13-401** as well!

IN ADDITION, SUBSTANTIALLY IDENTICAL REQUIREMENTS FOR THE FILING OF A COMPLAINT CAN BE FOUND IN RULES 401(d), 601(c)(d), 9-4(c), 10-601 (c)(d), 12-43(d)(e) AND 13-401(d)(e).

In years past, when a Debtor filed a Petition for Arrangement, such Debtor had benefit only of Sec. 314 of the Act (11 USC 714). Reference to this Sections will show that:

(1) The granting of a stay was **discretionary**.

(2) The granting of a stay without notice was possible

only where the situation involved suits **other than suits to enforce liens upon the property of a Debtor.**

(3) Suits to enforce liens upon the property of a Debtor could be stayed ONLY UPON NOTICE AND FOR CAUSE SHOWN.

Similar situations prevailed under other Chapters of the Act.

HOWEVER, by Order entered April 24, 1973, this Court promulgated the New Rules of Bankruptcy Procedure, decreeing that they "shall take effect on October 1, 1973 . . ." and thus, on the latter date, the Dark Ages of proceedings under the Bankruptcy Act came to an end!

Thereafter, any Debtor who filed Arrangement became the beneficiary of an **AUTOMATIC** stay under RULE 11-44 RBP. It was of no moment whether the suit did or did not involve enforcement of any "lien" against the property of Debtor—it was no longer necessary for the Debtor to **apply** for relief—THE RELIEF BECAME AUTOMATIC! As stated in the leading treatise on Bankruptcy:

> "Rule 11-44(a) . . . **protects the debtor against harassment and possible frustration of his rehabilitation** . . ." COLLIER ON BANKRUPTCY, 14th Ed. V. 8 Par. 3.20 at pages 234-5.

The judgment appealed from, although modified, tends to return Bankruptcy Administration to the Dark Ages of the past, prior to the existence of the New Rules of Bankruptcy Procedure.

First: The judgment condones violation of the "Equality of operation of legal precepts" as stated by ROSCOE POUND in his **Jurisprudence** V. 1 Par. 34 page 422.

Other Debtors will have benefit of the full measure of protection afforded by RULE 11-44 RBP. The **instant** Debtor, however, must process his rights under the Act under a **pending** foreclosure proceeding invoked AFTER the filing of his Arrangement, in clear violation of the Rule.

Second: Such DOUBLE-STANDARD is extremely bad as a matter of policy. It leaves to chance the fact that **some** Creditors will COMMENCE, while others will not, and also leaves to chance that in **some** Arrangements, there will be suits COMMENCED in violation of RULE 11-44 RBP, while in others, none.

Third: Such DOUBLE-STANDARD is extremely bad since it leaves effectiveness of witnesses as the criteria on which the Court should or should not condone violation of the Rule. In the **instant** case the District Court determined that the Creditor did not INTEND to violate RULE 11-44 RBP. **But the effect is the same, whether the Creditor intended the result or not!** In future cases, will such "intention" be clear and specific, and/or will future witnesses not be able to "claim" the best of intentions, irrespective of actual motives?

Fourth: The filing of the foreclosure proceeding remains of record in the office of the Clerk of Court of the Parish of East Baton Rouge, Louisiana.

Under Sections 306 and 307 of the Bankruptcy Act (11 USC Sections 706 and 707) Debtor's Plan of Arrangement can only provide for **unsecured** Creditors. Thus, the Anderson Claim does not fall within the benefits of Chapter XI since it is a SECURED Claim. Accordingly, the only alternatives open to Debtor are: (1) Discharge the Anderson Claim (which

Debtor cannot do at this time) **OR** (2) REFINANCE it through a loan from another source (which Debtor is attempting to consummate).

It is the REFINANCING attempts of Debtor that have been affected, for, Art. 254 of the Louisiana Code of Civil Procedure provides:

> "Art. 254. DOCKET AND MINUTE BOOKS
>
> * * * * *
>
> The clerk of the court **shall enter in the docket book the number and title of each action or proceeding filed in the court,** . . . ."
>
> (Emphasis ours)

—undoubtedly the provision referred to by the Bankruptcy Judge when he said:

> ". . . The fact that the proceeding was filed remains of record in the office of the clerk of the Parish of East Baton Rouge. . . ."
>
> (Tr 55 Lines 17-21)

It "chills" the heart of a potential investor to discover than an intended loan recipient is alleged to be **IN DEFAULT** with another lender—**especially** the lender to be replaced! **Other** Debtors are afforded refinancing opportunities without any COURT DOCKET INDEX bleating forth: DEFAULT! — DEFAULT! In this instant Arrangement, similar right is denied!

Fifth: The instant foreclosure proceeding demands "25% on both principal and interest as Attorney Fees" (Tr 65-66) in the approximate amount of **$46,000.00**! Would Appellee in all candor maintain that a claim of $46,000.00 for Attorney

Fees (in addition to principal, interest, and costs) could not possibly handicap Appellant in his re-financing efforts?

Sixth: By refusing to voluntarily withdraw his seizure and foreclosure, Appellee has caused the Federal Judiciary to enter the "sensitive nature of federal interference with state court proceedings" so aptly described in *International Ass'n of Machinists and Aerospace Workers v. Nix* (CA 5th 1975) 512 F.2d 125, *129*. Similar views can be found in *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.* (CA 5th 1969) 417 F.2d 387, *392-393*, Cert. Den. 90 S. Ct. 907, 397 U.S. 910, 25 L. Ed.2d 90, Reh. Denied 90 S. Ct. 1256, 397 U.S. 1030, 25 L. Ed.2d 543.

Perhaps the most forceful language is that found in *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.* (1970) 90 S. Ct. 1734, *1747*:

> "(8-12) First, a federal court does not have inherent power to ignore the limitations of Sec. 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. * * *"

While the formal stay envisioned by the Fifth Circuit is **necessary** under the circumstances of lack of compliance with RULE 11-44 RBP, the NECESSITY for the formal stay would have been alleviated, IF AND ONLY **IF** Appellee had complied with RULE 11-44 BRP, and/or had voluntarily withdrawn his foreclosure! Having forced the Federal Judiciary to enter into the "sensitive" area of interference with state

court proceedings, by a formal stay against a **state judge** and **sheriff**, we summor all of our ability to suggest to this Court that such resulting necessity now thrust on the Federal Court is not the most desirable development, from the standpoint of Bankruptcy Administration. Following the clear mandate of RULE 11-44 BRP would be, in Appellant's view, a **much better remedy**!

Seventh: The judgment appealed from constitutes a "Golden Wedge" in suggesting a course of action that could circumvent **seven** (7) of the Rules of Bankruptcy Procedure, viz:

> PLEAD GOOD FAITH OF THE CREDITOR AND ALLEGE THAT HE DID NOT KNOW OF THE FILING!

In the instant case, the foreclosure petition was **prepared** as well as filed, AFTER the filing of the Petition in Arrangement (Tr 42-46). This will prove **especially** welcome to those holders of: Certificates of Indebtedness, Bonds, Debentures, Collateral Mortgages, Pledges, Deeds of Trust, etc., **since incurring of the usual stipulations as to Attorneys' Fees can now be blanketed under the assertion that enforcement proceedings were filed, allegedly before actual notice of the Arrangement, irrespective of being prepared THEREAFTER**!

In the instant case, the delay between the filing of the Arrangement and filing of foreclosure, is deemed not unreasonable for the purpose of determining good faith. Will 5 days meet the same test? What about 6, 7, 8 or more? **IF** the test is based on when each particular Creditor receives **actual** knowledge of the filing, then what is the limit (if any) of the delay? Here we have an individual Debtor versus an

individual Creditor. What if the Creditor is a large Corporation? Do you date the Notice for determining good faith as of the time it is **first** received by the corporate entity, **or**, when it is first received by the proper official in the chain of command? **Or**, when it is relayed to Counsel?

Eighth: As pointed out in the 1976 Annual Report of the Director, Administrative Office of the United States Courts (at pages 10-15), there were **18,510** filings under the Act, in 1948. For the 12 month period ending June 30, 1976, the filings had **increased to 246,549**! For the 1967 period, there were only **1,033** filings under Chapter XI! For the 1976 period, the number had **increased to 3,235**! Against this background of substantial increase in volume, the judgment appealed from opens the way for an additional load to be thrown on the Federal Judiciary!

In the instant case, because of the **refusal** of Appellee to voluntarily withdraw a proceeding prepared and filed AFTER Arrangement, proceedings had to be instituted before (1) the Bankruptcy Judge, (2) the District Judge, (3) the Court of Appeals, and now (4) this Court. How many **other** proceedings in ALL the various Circuits will now become necessary, since the judgment appealed from has condoned the element of alleged good-faith lack of knowledge as a means of circumventing **at least seven (7) of the Rules of Bankruptcy Procedure**? We repeat the observation of the Fifth Circuit that its decision will have far reaching effects under ALL Chapters of the Bankruptcy Act!

SPECIAL ARGUMENT IN JUSTIFICATION FOR ISSUANCE OF THE WRIT

At the root of this evil is the view that:

THE SUPREME COURT DID NOT SAY WHAT IT MEANT, AND DID NOT MEAN WHAT IT SAID!

When the United States Supreme Court promulgated the New Rules of Bankruptcy Procedure, it could have **modified** RULE 11-44 (and the other companion Rules) so as to **delete** the term "**COMMENCEMENT**" therefrom, and said:

> —A Petition filed under Arrangement shall operate as a stay of the continuation of any court proceeding whether filed before or after the filing of the Arrangement—

INSTEAD, this Court chose to promulgate RULE 11-44 as it NOW stands, viz:

> "A petition filed . . . shall operate as a stay of the **COMMENCEMENT** . . . of any court or other proceeding against the debtor . . ."
> (Emphasis ours)

Thus, we will not "presume" that the United States Supreme Court **either** is unqualified to promulgate a Rule which it intends, **or** in fact promulgated a Rule which it did not intend!

In all deference to the District Court, there is **NOT AN IOTA OF DISCRETION** vested in the Bankruptcy Court on whether to allow **COMMENCEMENT** of such proceedings. Those who would seek to **COMMENCE** are relegated to the rights afforded by Sub-Section (d) and (e) of the said RULE 11-44! (Similar rights are specified in the other six related Rules). It is here that a mockery has been made of Sub-sections (d) and/or (e) of the said RULE 11-44 (and by implication, to the companion Sub-sections of the other related Rules), for, why should one bother with the filing of a **Complaint** to release the stay, if all one has to do is ignore the mandate of Sub-section (a)?

Under the view that one good picture is worth a thousand words, and the hope that one vivid illustration is worth an equal number of arguments, we cite the following to show the tragic developments that the New Rules of Bankruptcy Procedure have taken. In this, Special Counsel knows nothing of the situation except what appears in the Wall Street Journal article annexed. However, it would appear OBVIOUS that:

A) Debtor's Attorney had to procure a Docket Number from the Clerk of the Bankruptcy Court in Nebraska **PRIOR** to bankruptcy, in order that . .

B) Arrangements could be made with the Wall Street Journal beforehand, to publish the Notice of the filing on December 3, 1976 and . . .

C) **EMPHASIZE IN CAPS** in the Notice that

> "AS A RESULT OF THIS BANKRUPTCY, CERTAIN ACTS AND PROCEEDINGS AGAINST THE BANKRUPT AND HIS PROPERTY ARE STAYED AS PROVIDED IN BANKRUPTCY RULES 401 AND 601."

This illustrates, we respectfully submit, the tragic limits to which a Debtor's Attorney feels compelled to go, even under the New Rules of Bankruptcy Procedure, to give ACTUAL NOTICE to Creditors of the filing of any proceeding under the Act! **Yet, even under the judgment appealed from, it is doubtful that a well publicized Notice in the Wall Street Journal would be a bar to a Creditor pleading that he was not a subscriber to the Journal, and hence, did not become aware of the Notice!**

CONCLUSION

Indeed there will be a few cases where a Creditor in good faith will be unaware of the filing of a petition under the Act, and will **Commence**. . . . HOWEVER, in such instance if that Creditor really wishes to demonstrate his good faith, LET HIM **DISMISS** THE PROCEEDING WHICH IS FILED IN VIOLATION OF THE AUTOMATIC STAY! That, we submit, will demonstrate absolute Good Faith! In the situation where the Creditor will **NOT** voluntarily dismiss such proceeding, then the Bankruptcy Court should do its duty and ORDER the Creditor to dismiss the proceeding, under its broad powers afforded by Sec. 2a(15) of the Act (11 USC 11a(15)).

As stated in *S.E.C. v. UNITED STATES REALTY*, 310 U.S. 434, 60 S. Ct. 1044, *1053-1054*:

> "A bankruptcy court is a court of equity . . . and is guided by equitable principles. . . .
>
> ". . . a bankruptcy court cannot, because of its own notions of equitable principles, refuse to award the relief which Congress has accorded."

to which the writer would add the ancillary concept:

> As a court guided by equitable principles, a bankruptcy court SHOULD NOT, BECAUSE OF ITS OWN NOTIONS AS TO HOW THE NEW RULES OF BANKRUPTCY PROCEDURE SHOULD READ, refuse to enforce the clear mandate thereof!

IF RULE 11-44 RBP is to be changed, that privilege should be reserved solely and only to the United States Supreme Court. **Neither** any Appellate Court **nor** any District Court **nor** any Bankruptcy Court, should have such prerogative: ESPECIALLY WHERE SUCH CHANGE, BY IMPLICATION, AFFECTS THE FOLLOWING CHAPTERS OF THE BANKRUPTCY ACT:

Chapters I-VII.	*Bankruptcy*
Chapter IX	*Public Debt Adjustment*
Chapter X	*Corporate Reorganizations*
Chapter XI	*Arrangements*
Chapter XII	*Real Property Arrangements*
Chapter XIII	*Wage Earners' Plans*

PRAYER

Appellant urges and prays that this Court:

1 — Grant Certiorari, and

2 — After all due proceedings had, reverse the judgment appealed from, and Order and Direct the Lower Courts to direct DISMISSAL of the foreclosure petition filed, and

3 — Award Appellant and his Counsel reasonable expenses and Attorneys' Fees in procuring reversal by this Court.

4 — ALTERNATIVELY, if this Court will not decree reversal of the judgment appealed from, that it direct such judgment be further modified in order to provide that the Clerk of Court of the 19th Judicial District in and for the Parish of East Baton Rouge, Louisiana, CANCEL AND ERASE from the Court Index, any reference to the *filing* of

foreclosure proceeding No. 188369, in order that Appellant might be placed on equality with **other** Petitioners filing proceedings under Chapter XI.

5 — If this Court will not decree reversal of the judgment, or award further modified relief, that this Court, in its wisdom, consider granting Certiorari for the sole and only purpose of MODIFYING RULE 11-44 RBP (and the related Rules) according to the interpretation placed thereon by the Court of Appeals for the Fifth Circuit.

6 — And for any and all other relief necessary.

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
P. O. Box 3573
Baton Rouge, LA 70821
Tel.: 343-9194
Counsel for APPELLANT

ANNEXED:

Ltr of Appellant's Counsel to Clerks of both the District Court, and Court of Appeals.

Reply Ltr from Clerk, Court of Appeals.

Opinion of the Court of Appeals.

Order denying Rehearing.

Opinion of District Court.

Extract of Notice from WALL STREET JOURNAL of December 3, 1976.

CERTIFICATE OF SERVICE

I certify that I have this date, by prepaid mail, served copies of the foregoing Petition for Certiorari on the Appellee R. C. ANDERSON, through the latter's counsel of record: Judge Marvin F. Gahagan, Esq., GAHAGAN & GAHAGAN, 133 St. Denis—P. O. Box 70, Natchitoches, LA 71457.

BATON ROUGE, LA., this January 21, 1977.

FRANZ JOSEPH BADDOCK

TELEPHONE 343-9184

FRANZ JOSEPH BADDOCK
ATTORNEY AT LAW
POST OFFICE BOX 3573
BATON ROUGE, LOUISIANA 70821

January 3, 1977

The Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
NEW ORLEANS, Louisiana

The Clerk
United States District Court
Middle District of Louisiana
United States Courthouse
BATON ROUGE, Louisiana

RE: In the Matter of NOEL BERTHOLD BAUM, Debtor
NOEL BERTHOLD BAUM, Appellant
v.
R. C. ANDERSON, Appellee
Number 76-2764 Summary Calendar. United States Court of Appeals, Fifth Circuit. NOVEMBER 5, 1976

Gentlemen:

In accordance with RULE 21-1. of the Supreme Court of the United States, whichever of you is possessed of the record of this case, is requested to certify it and to provide for its transmission to the Supreme Court of the United States.

This request does not encompass request for certification of the entire record, but only that part of the record which constituted the record for appeal in Number 76-2764 above.

In this, I remain

Cordially,

FRANZ JOSEPH BADDOCK
Attorney for Appellant, Noel B. Baum

C.C. Judge Marvin F. Gahagan, Esq.
GAHAGAN & GAHAGAN
P. O. Box 70
NATCHITOCHES, Louisiana 71457

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

January 4, 1977

Mr. Franz Joseph Baddock
Attorney at Law
P.O. Box 3573
Baton Rouge, LA 70821

No. 76-2764 - In the Matter of: Noel Berthold Baum, Debtor
Noel Berthold Baum v. R. C. Anderson

Dear Counsel:

Under revised Rule 21 (1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari and, therefore, will not be routinely prepared by this office. 38 LW 3502.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan M. Graves
Deputy Clerk

/smg

enclosures

In the Matter of Noel Berthold Baum, Debtor.

Noel Berthold BAUM, Appellant,

v.

R. C. ANDERSON, Appellee.

No. 76-2764
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1976.

Debtor filed petition for an arrangement under Chapter XI of the Bankruptcy Act. Subsequently, a creditor filed a foreclosure in state court on a second mortgage he held on the debtor's home. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., denied the debtor's petition to dismiss the state court foreclosure proceeding and debtor appealed. The Court of Appeals, Brown, Chief Judge, held that creditor's foreclosure suit was automatically stayed while the petition for arrangement was pending and, in view of the fact that the foreclosure was sought in good faith and without knowledge of the petition for an arrangement, the district court did not abuse its discretion in denying dismissal of the foreclosure suit; however, due to the interests of third parties such as the state judge, the sheriff and others dealing with the debtor's property, there was necessity for entering a formal order staying the state court action.

Modified and as modified affirmed.

1. Bankruptcy ⇐965

Creditor's foreclosure suit in state court against property of debtor who had previously filed petition for arrangement under Bankruptcy Act was automatically stayed while petition was pending and, in view of fact that foreclosure was sought in good faith and without knowledge of petition for arrangement, district court did not abuse its discretion in denying dismissal of the foreclosure suit; however, due to interests of third parties such as state judge, sheriff and others dealing with property, there was necessity for entering formal order staying state court action. Bankr. Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.; Bankruptcy Rules, rule 11-44(a), 28 U.S.C.A.

2. Bankruptcy ⇐965

Because creditor's action against debtor in state court is automatically stayed until settlement of debtor's petition for arrangement under Bankruptcy Act, district court is not required to dismiss state court action; and it depends on circumstances whether there is any reasonable need to order dismissal of that action. Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.; Bankruptcy Rules, rule 11-44(a), 28 U.S.C.A.

Appeal from the United States District Court for the Middle District of Louisiana.

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

On late Friday, January 9, 1976, Noel Baum filed a petition in Federal Court

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

for an Arrangement under Chapter XI of the Bankruptcy Act. On Monday, January 12, 1976, R. C. Anderson filed a foreclosure in Louisiana state court on the second mortgage he held on Baum's home. In a blunderbuss appeal which he penned in colorful terms Baum sought sanctions, including a running daily monetary penalty based upon § 2(a) 15 of the Bankruptcy Act [1] and Rules 770, 771, and 914 of Bankruptcy Rules of Procedure [2] and a dismissal of the state foreclosure proceeding pursuant to Bankruptcy Rule 11-44(a).[3] He contends that the filing of a petition for an Arrangement requires the dismissal of all actions against the debtor filed subsequent thereto and a stay of those actions previously filed. The District Court affirmed the Bankruptcy Judge's dismissal of Baum's petition. We substantially affirm but reverse in part to assure an effective stay.

There is conflicting testimony concerning whether Anderson was aware of the

1. **Courts of bankruptcy may:**

"(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessarily for the enforcement of the provisions of this Act: Provided, however, that an injunction to restrain a court may be issued by the judge only."

2. **Rule 770. Judgment for Specific Acts; Vesting Title**

If a judgment directs a party to execute a transfer or to deliver a document or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. In proper cases the disobedient party may also be held in contempt in proceedings under Rule 920. The court in lieu of directing a transfer of real or personal property may enter a judgment divesting the title of any party thereto and vesting it in others and such judgment has the effect of a transfer executed in due form of law. When any judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the court.

Rule 771. Process in Behalf of and Against Persons not Parties

Rule 71 of the Federal Rules of Civil Procedure applies in adversary proceedings.

Rule 914. Procedure in Contested Matters Not Otherwise Provided for

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. In all such matters, unless the court otherwise directs, the following rules shall apply: 721, 725, 726, 728-737, 741, 742, 744.1, 752, 754-756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

3. **(a) Stay of Actions and Lien Enforcement.** A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

Arrangement petition at the time he filed his state court action. The Bankruptcy Judge found that Anderson's foreclosure petition was filed in good faith, and without his having any knowledge of the filing of the petition for Arrangement, as did the District Judge. We cannot find evidence in the record to warrant a reversal on clearly erroneous grounds so we accept the finding of facts by the Bankruptcy Judge.[4]

Anderson has agreed not to proceed further with his foreclosure and his offer to stay that action is in the record. However, he would not agree to dismiss the foreclosure, the lower court did not order him to dismiss, nor did it impose compensatory damages, hence, this appeal was taken by Baum. The District Court apparently felt that the statutory stay was enough. And in no sense did it recognize the right of the foreclosing mortgagee to proceed further. Baum asserts that since it is uncontradicted that the XI proceeding was in fact commenced before the state foreclosure petition Rule 11 44(a) compels its dismissal, that a stay is inadequate.

The provision for automatic stay of actions against the debtor under Chapter XI is very similar to other provisions in the Bankruptcy Act. A survey of the Act and Bankruptcy Rules of Procedure (BRP) reveals that the drafters intended that the filing of a petition would in many cases effect an automatic stay of collateral actions. For example, Ch. X corporate reorganizations [5], Ch. XII real property arrangements [6], and Ch. XIII wage earners' plans [7] all contain provisions similar to that found in XI.

Additionally in the Bankruptcy Rules of Procedure there are two more provisions for automatic stays found in Rule

4. Rule 752 BRP adopts Rule 52 of the Federal Rules of Civil Procedure providing that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Fifth Circuit has held that there may not be a reversal on a factual issue in a bankruptcy case unless it is found to be clearly erroneous. *Spach v. Strauss*, 5 Cir., 1967, 373 F.2d 641.

5. BRP 10-601(a) provides that a petition filed under Rule 10-104 or 10-105 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate.

6. BRP 12-43(a) provides that a petition filed under Rule 12-6 or 12-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

7. BRP 13-401(a) contains a similar provision:

. [A] petition filed under Rule 13-103 or Rule 13-104 shall operate as a stay of the commencement or continuation of any action against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate.

401 [8] and Rule 601 [9] against certain actions on unsecured debts and lien enforcements, respectively.

It is not by accident that the same provision reoccurs in the Act so frequently. The Advisory Committee's Notes contain the reason. Under the notes to BRP 10-601, 12-43, 13-401, 11-44, and 401 we are told that these provisions are all intended to supplement and reinforce the policy of § 11(a) [10]. Section 11(a) provides for a mandatory stay until adjudication or dismissal of the petition of all actions founded on dischargeable debts which are pending against the bankrupt when the petition is filed. The stay in § 11(a) is primarily for the benefit of the bankrupt that he may avoid harassment which results from a creditor filing an action in another court with regard to the same debt.[11]

It was not until 1973 with the advent of the Bankruptcy Rules of Procedure that the stay of collateral actions became automatic. Prior to this time bankruptcy judges had discretion in granting or denying stays.[12] The intent of the drafters that stays should be automatic is buttressed by the adoption of Rule 9-4 which became effective in August of this year. Once again the provision for automatic stay is carried into another area of the Bankruptcy Rules of Procedure.[13]

[1, 2] Because we give full voice to the rules calling for an automatic stay our decision will have far reaching effects on all the Chapters of the Act. Our decision is made with the recent changes of the Act and the Advisory Committee's Notes in mind. But it does not reach the limits which Baum seeks. We hold that while there is no question

8. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

9. The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

10. The power created under § 2a(15) and supplemented by Rule 401(a) is used by the courts of bankruptcy to stay proceedings that will primarily affect the bankrupt's estate and its administration or custody. Collier on Bankruptcy, Vol. 1-(a), ' 11.02.

11. *Id.*

12. That the court had discretion in granting stays under § 314 but not under Rule 11-44(a) is evidenced by the wording. Section 314 reads:

§ 314. Stay of actions

—The court *may*, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor. (Emphasis added).

Rule 11-44 states that the petition *shall* operate as a stay. See note 3, *supra*.

13. A petition filed under Rule 9-3 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the petitioner or any officer or inhabitant thereof, which seeks to enforce any claim against the petitioner, or of any act or the commencement or continuation of any court or other proceeding to enforce any lien on the property of the petitioner or a lien on or arising out of taxes or assessments due the petitioner, and shall operate as a stay of the enforcement of any setoff or counterclaim relating to a contract, debt, or obligation of the petitioner.

that the action in the state court is and should be stayed until the settlement of the Arrangement, the lower court was entitled to decide that it was not mandatorily required by the rules to dismiss the state court foreclosure since the equivalent protection would be afforded by the automatic stay which we now require to be entered formally.

While literally the commencement of an action after the Arrangement petition is filed invokes the rule automatically as we have held, there are questions, depending on the circumstances whether there is any reasonable need to order a dismissal of the action; whether a stay is in fact adequate.

Baum has received the benefits intended to be conferred by the Act and Rules either under § 2(a)15 or BRP 11-44(a). He is not being harassed by the mere filing of Anderson's foreclosure petition (quite the contrary, Anderson has fully co-operated with the court and his Arrangement plan was not defeated by the Bankruptcy Judge's refusal to dismiss the foreclosure.)

The Bankruptcy Rules of Procedure cited above, 10-601,[14] 12-43,[15] 13-401,[16] 401,[17] 601,[18] and 9-4 [19] have more in common than just protection of the debtor from harassment or protection of the estate. To give the Bankruptcy Court ample leeway to meet all situations these Rules without exception grant the Bankruptcy Judge the power, for cause shown, to terminate, annul, modify, or condition the stay. This grant of power makes it unnecessary to agree with Baum's contention that the Court must dismiss every action filed subsequent to the XI petition.

The Bankruptcy Judge found, and the record does not dispute, that Anderson acted in good faith, filing his foreclosure petition without knowledge of Baum's XI petition. While some action must be taken to obliterate the effectiveness of the state court's order [20] and the sheriff's duty to act on it [21] all of these problems will be met by the issuance of a formal stay. We differ with the District Judge in a very limited degree to this extent, due to the interest of third parties such as the state judge, the sheriff and others dealing with the property, there was a necessity for entering a formal order staying the state court action. Although counsel for Anderson has conceded by way of a carbon copy of a letter to the sheriff and state court that the foreclosure action is stayed, this is not enough. The petition filed in state court under 6 LSA CCP Art. 2631 *et seq.* calls for the entry of an order requiring seizure. State court Judge Pickett, following this procedure, issued the order requiring the sheriff to take possession of the property.[22] This order is still outstanding and no letter from counsel for Anderson can minimize the existence or validity of the

14. See note 5, *supra*.

15. See note 6, *supra*.

16. See note 7, *supra*.

17. See note 8, *supra*.

18. See note 9, *supra*.

19. See note 13, *supra*.

20. 6 LSA CCP Art. 2638 provides that if a party is entitled thereto, the Court shall order the issue of a writ of seizure and sale commanding the sheriff to seize and sell the property affected by the mortgage, which order was entered in this case on January 13, 1976 by the state court judge.

21. LSA-RS 13-3858 subjects the sheriff to fines ranging from $25 to $500 and imprisonment for 30 days to six months plus civil damages for failure to seize property as ordered.

22. "Let executory process issue herein, and let a writ of seizure and sale issue herein as prayed for and according to law."

order or the sheriff's obligation to execute on it.

We remand with directions to the District Court to enter a formal order staying the foreclosure pending the conclusion of the Arrangement or further order of the District Court.

MODIFIED AND AS MODIFIED AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORRECTED

NO. 76-2764

U. S. COURT OF APPEALS
FILED
DEC 2 1976
EDWARD W. WADSWORTH
CLERK

IN THE MATTER OF: NOEL BERTHOLD BAUM, Debtor

NOEL BERTHOLD BAUM,

Appellant,

versus

R. C. ANDERSON,

Appellee.

- - - - -

Appeal from the United States District Court for the
Middle District of Louisiana

- - - - -

ON PETITION FOR REHEARING

(DECEMBER 2 , 1976)

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ John R. Brown
CHIEF JUDGE

Form 703-2

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

IN RE

NOEL BERTHOLD BAUM,

Debtor

IN PROCEEDINGS FOR AN ARRANGEMENT

NO. 76-012

* * * * *

NOEL BERTHOLD BAUM,

Appellant

VERSUS

R. C. ANDERSON,

Appellee

* * * * *

U. S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
FILED Jan 2 1976
CHARLES H. BANTA
CLERK

E. GORDON WEST, District Judge:

This is an appeal from an order of the Bankruptcy Judge denying appellant's motion for sanctions against a creditor, R. C. Anderson. The debtor, Noel B. Baum, filed a Chapter XI petition in the Bankruptcy Court on January 9, 1976. On January 12, 1976, a secured creditor, R. C. Anderson, filed a petition for Executory Process in the State Court seeking to foreclose on a mortgage securing the debt owed him by the debtor, Noel B. Baum. Counsel for the debtor sought to have Mr. Anderson withdraw and dismiss his State Court suit because it was filed after the debtor's petition had been filed in the Bankruptcy Court. It was the debtor's position that the filing of the State Court suit was a violation of Rule 11-44

of the Rules of Bankruptcy Procedure which provides that the filing of a debtor's petition "shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor * * * ." Counsel for Anderson advised the debtor's attorney that he acknowledged the fact that all further proceedings in the State Court suit were stayed and that the Clerk and the Judge of the State Court had been so advised, but that the suit would not be voluntarily withdrawn. This apparently raised the ire of counsel for the debtor and he then filed a motion in the Bankruptcy Court seeking to have a $200 per day penalty assessed against Mr. Anderson, a $600 attorney fee awarded, and "such further relief as is deemed appropriate against R. C. Anderson, his attorneys, the Clerk of Court for and Sheriff of the Parish of East Baton Rouge, Louisiana, including cancellation of and/or transfer of the mortgage and mortgage note during the pendency of this proceeding."

On March 4, 1976 the Bankruptcy Judge held a hearing on that motion and at the conclusion thereof denied the relief sought by counsel for the debtor. This appeal followed.

Now, having reviewed the record in this case, including the transcript of the hearing held before the Bankruptcy Judge and the brief filed by the mover, it is the opinion of this Court that the Bankruptcy Judge committed no error in denying

the debtor's motion for sanctions. No one has been prejudiced in any way by the filing of the State Court suit, and all proceedings other than the mere filing of the suit itself have been appropriately stayed. The mere filing of this suit in no way interferes with the orderly process of these bankruptcy proceedings before the Bankruptcy Court. It is obvious that there was no bad faith involved in the filing of that suit. Indeed, there is reason to believe from the evidence that Anderson did not know that the bankruptcy proceedings had in fact been filed at the time the State Court suit was filed. No harm to anyone has been done. The Bankruptcy Judge did not abuse his discretion, and his decision does not in any way "enunciate a Policy which encourages non-compliance with the terms of said Rule 11-44 * * * " as contended by mover. There is no error in the ruling of the Bankruptcy Judge and therefore his order dismissing the debtor's motion for sanctions will be and it is hereby AFFIRMED.

Baton Rouge, Louisiana, June 2, 1976.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
for the District of NEBRASKA

In re

THE OBSERVATORY OF NEBRASKA, INC. } Bankruptcy No. BK73-0-1231

Bankrupt*

ORDER FOR FIRST MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the bankrupt, his creditors, and other parties in interest: THE OBSERVATORY OF NEBRASKA, INC. of** Omaha, Nebraska having been adjudged a bankrupt on a petition filed [or against] him on December 3, 1973, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at Room 9017, New Federal Bldg., Omaha, Nebraska, on December 7, 1976, at 10:30 o'clock a.m.

2. The bankrupt shall appear in person [or if *the bankrupt is a partnership*, by a general partner, *or, if the bankrupt is a corporation*, by its president *or other executive officer*] before the court at that time and place for the purpose of being examined.

3. February 7, 1977 is fixed as the last day for the filing of objections to the discharge of the bankrupt.

4. February 7, 1977 is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c(2) of the Bankruptcy Act.

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee, elect a committee of creditors, examine the bankrupt as permitted by the court, and transact such other business as may properly come before the meeting.

AS A RESULT OF THIS BANKRUPTCY, CERTAIN ACTS AND PROCEEDINGS AGAINST THE BANKRUPT AND HIS PROPERTY ARE STAYED AS PROVIDED IN BANKRUPTCY RULES 401 AND 601.

If no objection to the discharge of the bankrupt is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the bankrupt will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Bankruptcy Act is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the bankrupt. Claims which are not filed within 6 months after the above date set for the first meeting of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed.

Attorney for Trustee:
Thompson, Crounse & Pieper
300 Farm Credit Bldg.,
Omaha, Nebraska 68102

Dated: November 1, 1976

DAVID L. CRAWFORD
Bankruptcy Judge